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TO: Chief Counsel
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October 14, 2003

Chief of Records
Attn: Request for Comments
Office of Foreign Assets Control
1500 Pennsylvania Avenue NW
Washington DC 20220

Comments by the National Lawyers Guild and its Cuba Subcommittee on the Interim Final Rules, Department of the Treasury, Office of Foreign Assets Control: "Foreign Assets Control Regulations; Reporting and Procedures Regulations; Cuban Assets Control Regulations: Publication of Revised Civil Penalties Hearing Regulations," *68 Fed. Reg. 53640 (Sept. 11, 2003)*

The National Lawyers Guild and its Cuba Subcommittee have worked to uphold the right of US citizens and residents to travel abroad, including to Cuba, in the face of some 40 years of attempts to restrict travel and contacts between the peoples of these two sovereign nations and neighbors.

These regulations continue, or exacerbate, OFAC practice of threatening US nationals with substantial deprivation of their rights, merely because they exercised their constitutional right to travel and associate with people in Cuba. For example, the regulations indicate that persons -- and their witnesses -- would generally be required to travel to Washington, D.C., merely to prove their defenses at the hearing stage. OFAC knows that this will be unduly burdensome for many citizens and residents throughout the US. Added to this is OFAC's persistent expressions that such travelers, called Respondents, may be presumed to have violated the law, may have their rights to discovery of the government's apparent double-standards and selective enforcement severely limited, and to have their opportunity to present their full defenses severely impeded.

§ 501.702 Definitions.
We object to the new section on the basis of it being confusing. OFAC has done a poor job of defining "Order of Settlement" and "Proceeding." The latter is extremely vague: "any agency process...?" The two definitions are related in that an order of settlement is any order that terminates such an agency process. Also, later sections, such as § 501.707, refer specifically to settlement prior to an *Order Instituting Proceedings*, but an *Order of Settlement* can only occur when an instituted proceeding is terminated. Furthermore, the definitions define "Respondent" but the next section, 703(a), also defines the same term.

§ 501.703 Overview.
The overview appears to be the only place in the new section that specifically states that a respondent has a right to seek judicial review of an agency decision. The effect of the way this right is articulated here is to hide it from those who might expect to find it at the end of Part 501, and to seemingly create a clear exhaustion requirement that did not previously exist. It suggests that if OFAC were to issue a penalty and improperly deny ALJ review of it, there would be no final decision subject to review. The regulation should specify that when a Director imposes a penalty, *it is a final decision subject to review*, at very least in the case where the right to ALJ review has not been effective.

§ 501.705 Service and filing.

(1) In § 501.705(a), "other related orders" is unclear, and the entire sentence is badly drafted, in that the relationship of the "and " and "or" is ambiguous. Read literally, it could mean that the Director has an option of not properly serving anything at all, just potential future amendments or supplements (his choice of which). In § 501.705(c)(1)(i), there appears to be another drafting issue, since it requires documents be "served upon the Director in accordance with paragraph (a)" – but paragraph (a) refers to service ***by*** the Director, not on him. This seems to contradict the following subsection.

(2) In § 705(a)(1)(i), the new regulations continue to be undemanding in terms of service requirements upon respondents. Service to one's last known address does not assure effective service. In § 705(a)(1)(ii), OFAC is permitted to make substituted service without having to make any reasonably diligent effort to make service by a more effective means, i.e. personal service. In § 705(a)(2), service upon any bona fide officer or director is sufficient

even if a corporation has numerous officers and directors and specifically designates one as its agent. OFAC has a problematic history of not sending any communications for years to a potential Respondent, then presuming any failure of receipt to be irrelevant or the result of attempts to avoid service. The regulations should be amended to require reasonable diligence by OFAC to obtain actual service, such as by finding the current address by means of the telephone book, the internet, or by requesting post office forwarding and/or address correction service.

(3) In § 705(a)(1)(i), the regulations specify that a presumed mailing date may be rebutted "only by presenting evidence of the postmark date." OFAC should strike the "only," which makes it harder, not easier to rebut a date which has not generally been reliable. Why prevent someone from showing any other type of proof that such a dubious presumption is false?

(4) In § 705(c)(1)(i), the regulations state that all documents "subject of a motion seeking a protective order" are exempt from service. This is obviously overbroad. If the motion concerns release to third parties, for example, there is no reason not to serve it, and failure to serve it would certainly prejudice the rights of the nonmoving party. Also, the regulation is ambiguous in that, but for it being hideously unfair, it might mean that even documents that were the subject of failed protective motions remain exempt from service.

(5) In § 705(c)(4)-(6), there are lots of new formal requirements which respondents may very easily fail to meet. What is the effect if they are not met? If two different grades of paper are used, does a respondent automatically lose? OFAC should add language specifying that failure to meet these standards, unless actually prejudicial to the other side, has no consequences.

§ 501.706 Prepenalty Notice.
We submit two objections to changes in this section. First, there have been two seemingly minor changes in wording that may be very significant. In § 706(a), "reasonable cause" has been changed to just "reason" to believe. This seems like a lower standard, requiring just a hint rather than an objectively reasonable quantum of evidence. And in § 706(b)(2), the right to "respond" has now become the right to make a "written presentation." Respondents should have the right to respond in an appropriate manner without undue formality. The old regulation was misleading in that it suggested something very simple was required, "The written response need not be in any particular form," but then went on to specify numerous requirements. The new regulation seems to signal that something rather complex and difficult is required, perhaps more than actually is required. The best solution is not to require any particular form of response and to allow its contents to be more general.

Also, § 706(b)(2)(i) specifies that respondents will be told that providing information against themselves may reduce penalties against them, a proposition with Fifth Amendment implications. This notice seems to function as an enticement to self-incriminate. It would be more consistent with the spirit of American liberty to instruct respondents that they do not have an obligation to supply information against themselves and that failure to supply such information will not lead to penalties against them. OFAC should affirmatively advise all respondents that they may wish to seek legal counsel in order to protect their rights

§ 501.707 Response to Prepenalty Notice.
In addition to the critique of response requirements made in response to the previous section, we object here to various new problems created by revisions to this section.

(1) In § 707(a)(3), what does it mean when regulations say that right to respond to a Prepenalty Notice is waived? It should at least be specified that rights to contest any penalty at a later stage have been preserved. Likewise, in § 707 (b)(1)(i), anything not addressed in the response is admitted. Does this apply where there is no response? Could one be worse off with an incomplete response than with none at all? This would be true if admission meant more than just a waiver of relief at a particular stage of the civil penalty process. OFAC should revise the regulation to specify that any constructive "admission" from failure to deny any contention in a response to a prepenalty notice merely "admits" the uncontested matter for the purpose of that particular stage in the process, and cannot be used in the future to presumptively establish a violation. Also the requirement that a response to a prepenalty notice

"specifically" address each allegation should be eliminated to permit blanket denials of some or all allegations, as appropriate. As written, a failure to make a denial in the proper form could be unfairly treated as an admission.

(2) In § 707 (b)(1), there are new requirements for labeling of the response and inclusion of mitigation claims. This unduly increases the burden on respondents to respond in a particular format. Also, the regulation does not explain claims for mitigation. It would be worthwhile for the regulation to suggest to respondents who would not know otherwise, what types of facts would constitute some acceptable claims for mitigation.

(3) In § 707 (b)(1)(ii), language has been eliminated which had specified that material omitted from a response to a prepenalty notice could still be presented to a respondent's advantage upon a showing of good cause why it should be considered. This appears to suggest any waiver from failure to include material in a response to a prepenalty notice is more difficult to overcome than before. Language similar to the old "good cause" language should at minimum be restored to the regulation so as not to discourage respondents from seeking to supplement their original responses. Such supplementation can only benefit the just, accurate, and efficient resolution of the civil penalty process. Absent a showing of specific prejudice to OFAC, no evidence should be barred from due consideration at a later stage.

(4) In the same section, what is "additional or new matter?" This phrase was used before, but the matter is even more confusing now that § 713(c) has been created referring to "new" matter that is "within the scope" of an earlier submission.

(5) Also note that, in another apparent drafting mishap, § 707(b)(2) refers to a nonexistent paragraph (c) in the same section.

§ 501.709 Penalty Notice.
Section 709(a) strikes the language from the earlier parallel provision, old § 515.704(b), that limits the Director's imposition of a penalty to a situation where there is an "absence of a timely hearing request." That phrase should be retained in some form substantially similar to "in the absence of a timely hearing request received under those regulations in effect prior to September 11, 2003." Otherwise, it appears that a respondent who has previously asserted their right to a prepenalty hearing will be denied that right and issued a penalty, and thereafter further required to file a second hearing request.

§ 501.710 Settlement.
There is one very vague phrase in § 710(b)(5)(i): "subject to acceptance of the offer." That language could easily mean – and literally does mean – that unless the contrary is included in a settlement offer and subsequently agreed to, the act of submitting an offer waives virtually all of a respondent's rights and functions as a complete admission, even precluding judicial review on independent grounds. OFAC should change this to state the opposite, that only upon acceptance does a settlement offer waive any rights, and then only those rights specifically identified in the final settlement agreement.

§ 501.713 Order Instituting Proceedings.
In contrast to other parts of the new regulations, this new section leaves a variety of gaps that should be filled.

(1) The new § 713 (intro) has been created states that the Director may withdraw an Order Instituting Proceedings. However, the effect of such a withdrawal is not specified. The new regulation should be further articulated to state that withdrawal of order instituting proceedings dismisses the case against the respondent with prejudice. Any other effect would merely allow the Director to stop and start actions at will, much to the prejudice of respondents.

(2) The new § 713 (b) indicates that the Director can issue a single Order Instituting Proceedings to cover the matters contained in several prepenalty notices. The new regulations, however, lack rules specifying how and when this may be done. It should be specified that multiple actions may be subject to a single such order only when the

Director could otherwise issue multiple OIPs, and when the combination of actions into a single order would not prejudice the rights of the respondent.

(3) As noted above, § 713 (c) refers oddly to "new or additional" matters that nevertheless are "within the scope" of a previous order. What does it mean – new but within the old scope? Also, OFAC should add language similar to the non-prejudice language that appears in § 717 to prevent the consolidation mechanism from being used tactically to the detriment of respondents.

§ 501.714 Answer to Order Instituting Proceedings.
In § 714 (c), the new regulations provide that a motion for more definite statement must accompany the answer to the order instituting proceedings. If a point made in the order is unclear, however, it would be more appropriate to suspend the deadline to answer it until the more definite statement has been issued. Otherwise an unclear statement could become a tactic for obtaining at least a partial answer prior to full disclosure of the allegations.

§ 501.715 Hearings.
In § 715, the new regulations continue to require that hearings be presumptively held in Washington, DC unless there is an agreement to the contrary. The changes incorporate new language that requires an "extraordinary reason" before a hearing can be moved elsewhere, even if the Director, ALJ, and all parties were to agree that ordinary reason favored holding the proceeding elsewhere. The regulation would be improved if it were to state that hearings would ordinarily be held in the forum most convenient for the participants collectively, which would ordinarily be in the home city of the respondent. This is true in part because administrative hearings involve little overhead in terms of facilities and support staff, and in part because the timing of hearings is ultimately controlled more by OFAC than by citizen respondents. It is also particularly true because the rules allow for proceedings involving several respondents to be combined, and it is not uncommon for individuals to travel abroad in groups. Where many respondents and witnesses share a common city outside Washington, DC, it would be far more equitable and efficient to bring the ALJ and the OFAC counsel to the city where they all reside than to force the many to travel for the convenience of the few.

§ 501.721 Hearings to be Public.
This section states that hearings may be closed to the public but includes no guidelines doing so. This section should be expanded to state that there is a burden to be met by demonstrating substantial need for secrecy before the ALJ may deprive a respondent of a public hearing in full or in part.

§ 501.723 Discovery.
In § 723(b)(ii), both sides are required to submit their legal theories simultaneously. An exception should be made for theories that do not stand independently, but respond to opponent's theories. In § 723(f)(2), new language has been added that permits the ALJ to limit discovery too freely: § 723(f)(2)(ii), for example, seems to place a very vague time limitation on discovery – one there has been opportunity to discover something, that opportunity becomes sufficient ground for henceforth denying further discovery. And there is no exception, as in § 724(b), for exculpatory material. Also, § 723 (f)(1) and (4) permit OFAC to withhold anything that would not be available to the general public, which seems like an extreme limitation on evidence-gathering. Materials covered by the Privacy Act or exempt from Freedom of Information Act disclosure are not discoverable. The rule should be changed to allow the ALJ to at least balance interests, particularly if the evidence is potentially exculpatory.

§ 501.724 Documents that May Be Withheld.
Just as § 723 (f)(1) and (4) permit OFAC to assert broad privileges which would not be available in a civil court, § 724(a) adds a reassuance of these privileges even in the face of a contrary order by the ALJ. This compounds even more seriously the problems stated above. The only limitation on this power to withhold is that documents may not be withheld under this section that contain exculpatory information. This section should be eliminated, but if it is

not, the exculpatory evidence provision should be changed. Because a document subject to the provision may be necessary to identify exculpatory evidence it does not actually contain, it should provide that no document may be withheld pursuant to it where such a withholding would function to deprive the respondent of knowledge of or access to potentially exculpatory evidence.

§ 501.726 Motions.
Revisions to this section eliminate the requirement of attaching a proposed order to any motion, but retain the rule that such a proposed order, if attached, will be the subject of a waiver of objection if there is no timely response to the motion. This is not an inconsistency, precisely, but it seems prone to promote confusion and defy expectation. Because the effect of waiver is directed solely at a proposed order, the effect would be to effectively extend indefinitely the period during which one could object to a motion with no such accompanying order.

§ 501.727 Motion for Summary Disposition
The rules do not include any reference to a motion to dismiss, only a motion for summary disposition. While in civil court proceedings, the two types of motion are distinct, the failure to explicitly provide for dismissal raises the possibility that the strictures of a summary disposition motion would be deemed necessary for a motion for dismissal. The distinction between defensive summary disposition and dismissal should appear in the rules. With respect to the statement of "material facts" in a motion for summary disposition, it should be clarified that only those facts material to the actual basis of the motion require exposition in the motion itself or its supporting brief.

§§ 501.729, 739, 742, 744 Contents of Record.
Section 729(b) states that filings deemed deficient are not to be part of the record. Subsequent sections, e.g. §§ 739(c), 742(a), 744(b), specify what subsequently happens to items not made a part of the record but fail to indicate that they will be submitted to a court along with the record upon any future judicial review. This should be clarified to facilitate complete and fair judicial review of agency determinations.

§ 501.730 Depositions upon Oral Examination.
New § 730(f) assigns the full cost of any deposition to the requesting party. This assignment should be rejected in favor of the more customary rule that bills each side for their fair share of pages questioning. Since depositions are subject to cross examination, the rule as currently stated discourages the use of short depositions by respondents with limited resources because after their questioning ends, the opposing side will be able to cross examine at length and impose the entire transcript cost on the respondent.

§ 501.732 Evidence.
Two objections to recent changes in this section.

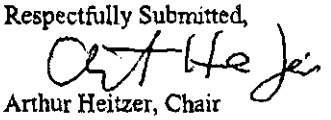
(1) Section 732 (intro), now states that the ALJ shall admit all material evidence. This is an extreme position that is hard to take seriously, and was probably not intended as it reads. If taken literally, it seriously diminishes any potential role that the Federal Rules of Evidence could serve as guidelines, and the use of the Federal Rules as guidelines would be very appropriate. The previous rules expressly stated that evidence could be rejected as cumulative or prejudicial, which was realistic. It would be appropriate at least in some cases to reject other evidence that would be excluded under the Federal Rules of Evidence or other applicable laws, and it should state explicitly that evidence will be excluded that was acquired in contravention of the Bill of Rights.

(2) New provisions in § 732(b) expand the power of the ALJ or Secretary's designee to take official notice of facts not demonstrated in the record. Such change is unwelcome because official notice is a device which may even the best hands be subject to abuse; (the internment of Japanese Americans during World War II was sustained in part through a similar abuse of judical notice). There is no necessity that simply anything in OFAC files, or regarding which OFAC claims administrative expertise should be given any presumption, rather than merely offered and

considered where admissible with whatever weight is appropriate. While there is a procedure for objecting in the rules to a motion for official notice, there is no mechanism articulated for a respondent to object if an ALJ were to take official notice of a fact sua sponte.

§ 501.734 Prior Sworn Statements.
It would be ideal, if hearings are generally to be held in Washington, DC, far from where many respondents reside, to permit liberal use of testimony procured by deposition in locations outside Washington. Instead, the regulations make it difficult to do this, and new changes in § 734 appear to make this harder rather than easier.

Respectfully Submitted,



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